UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN VAN GELDERN, Plaintiff and Appellant, vs. ABELICIO CHAVEZ, FRED N. DICKSON, WILLIAM H. MADDEN, AUGUST G. KETTMAN, HARRY M. KAMP, FRED G. BELL AND DOUGLAS BARRETT, Defendants and Appellees.	)	No. 21881

APPELLEES' BRIEF

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JURISDICTION

Plaintiff and appellant has invoked the jurisdiction of this Court under Title 28, United States Code sections 1215 and 1291 which make a final order in a Federal District Court reviewable in the Court of Appeal.

STATEMENT OF THE CASE
AND OF THE FACTS

On September 22, 1966, appellant filed a complaint in the United States District Court for the Northern District of California alleging that appellees had denied him his civil rights (RT 1-24). Appellant's complaint, in essence, stated that he had been subjected to arbitrary and invidious discrimination by the California

Parole Board and that as a result had been subjected to greater and different punishment than others in similar circumstances. Appellant asserted that the Adult Authority had made an arbitrary decision to deny him parole and thereby his freedom, based upon information not arrived at by due process of law; specifically he asserted that, the California Adult Authority had no jurisdiction to consider his personal or business activities during the period of his escape. Appellant hinted at bribery and corruption of state officials and seemed to assert that personal hatred toward him by some of the defendants resulted in the Adult Authority denying him parole. The complaint prayed for $25,000 actual damages against defendant Abelicio Chavez, and an additional $10,000 in actual damages against the other named defendants or the total sum of $85,000 exclusive of any and all court costs, as compensatory and punitive damages (RT 18).

On November 3, 1966, appellees filed a notice of motion and motion to dismiss and points and authorities in support of motion to dismiss. On November 7, 1966, appellant filed an affidavit for entry of default by the Clerk of the Court and on November 17, 1966, he filed a motion in opposition to the motion for dismissal.

On November 29, 1966, appellant filed a motion

for declaratory judgment and injunctive relief. On January 6, 1967, Judge Peckham of the District Court filed his order dismissing the action with leave to amend complaint. The court stated:

> "If it is plaintiff's claim that he is eligible for and is being deprived of parole solely because of the bribery and corruption of state officials, then he should more particularly allege this claim. Further, if the plaintiff claims such deprivation occurs because of such a personal hatred by the Defendants or some of them of the Plaintiff as to preclude them from reaching a disposition of his parole application consistent with the rights, privileges or immunities secured by the Constitution and Laws of the United States, then he should more particularly allege this claim." (RT 65).

On January 25, 1967, appellant filed his amended complaint (RT 67-114). The amended complaint alleged that appellant's wife had talked with a former employee of the appellant, and in this conversation the former employee told appellant's wife that he had been present when the present management of plaintiff's former company stated

that they had spent a considerable amount of money to see that appellant would be retained in prison. The amended complaint also made reference to interviews appellant had had with appellees concerning appellant's conduct while he was an escapee and his general rehabilitation progress while in prison.

On February 21, 1967, appellees filed a notice of motion and motion to dismiss and memorandum of points and authorities in support of motion to dismiss. On March 2, 1967, appellant filed a motion in opposition to the motion to dismiss his amended complaint and he also filed a motion for declaratory judgment and injunctive relief.

On March 23, 1967, Judge Wollenberg of the District Court filed his order granting appellees' motion to dismiss based upon the asserted grounds[1/] (RT 136).

On March 26, 1967, appellant filed a motion for certificate of probable cause for leave to appeal and affidavit in support thereof together with a motion to proceed in forma pauperis under Title 28, United

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1. The grounds contained in defendant's motion to dismiss are set forth hereinbelow under Summary of Appellee's Argument.

States Code section 1950. Appellant's request to proceed in forma pauperis was granted by the District Court on April 19, 1967, and appellant filed his notice of appeal on April 20, 1967.

SUMMARY OF APPELLEES' ARGUMENT

The amended complaint does not state a cause of action.

A. In determining whether a prisoner is a good risk for release on parole the Adult Authority may consider his conduct in another state while he was an escapee.

B. Appellant's allegation that he is being denied parole is not an allegation of a violation of rights under the Constitution or statutes of the United States.

ARGUMENT

THE AMENDED COMPLAINT DOES NOT STATE A CAUSE OF ACTION

A. In determining whether a prisoner is a good risk for release on parole the Adult Authority may consider his conduct in another state while he was an escapee.

In his amended complaint appellant alleged that appellees denied him due process when they considered his conduct in another state while he was an escapee from a California state prison. Appellant claimed that the

evidence was hearsay and that it was inadmissible at the Adult Authority hearing. Appellant further asserted that appellee, Abelicio Chavez, was biased and personally did not like him, and for that reason denied him parole.

The District Court properly recognized that it had no power to interfere with the conduct of the Adult Authority when the "invidious discrimination" allegations of appellant were unsubstantiated, vague and indefinite thereby being insufficient to raise any issues. Hoffman v. Halden, 268 F.2d 280, 292 (9th Cir. 1959), overruled on other grounds in Cohen v. Norris, 300 F.2d 24 (9th Cir. 1962); United States v. Bolsinger, 311 F.2d 215, 216 (3rd Cir. 1962), cert. denied, 372 U.S. 931 (1963).

Appellant's contention that due process prohibited the Adult Authority from considering his conduct in another state during his period of escape from the State of California was expressly rejected in Hyser v. Reed, 318 F.2d 225, 233 (D.C. Cir. 1963), where the court stated at page 240:

> "As to the constitutional claim, it is sufficient to note that the Parole Board is not bound by the rules of evidence in considering information relating to parole violation. It is the established practice of the Board to

consider all communications, i. e., affidavits, letters, . . . even though hearsay in the strict evidentiary sense, in reaching a conclusion. This flexibility affords greater protection to alleged violators than would be allowed in an adversary proceeding with conventional rules of evidence. It permits the Board to consider all relevant information which may be helpful to the parolee."

In Washington v. Hagan, 287 F.2d 332 (3rd Cir. (1960), cert. denied, 366 U.S. 970 (1961), the court stated at page 334:

". . . [T]his matter of whether a prisoner is a good risk for release on parole or has shown himself not to be a good risk, is a disciplinary matter which by its very nature should be left in the hands of those charged with the responsibility for deciding the question. . . .

". . . [T]he problem becomes one of an attempt at rehabilitation. The progress of that attempt must be measured, not by legal rules, but by the judgment of those who make it their professional business."

/

B. Appellant's allegation that he is being denied parole is not an allegation of a violation of rights under the Constitution or statutes of the United States.

The administration of parole is an integral part of criminal justice, having as its objective the rehabilitation of those convicted of crime and as its further objective the protection of the community. Ex parte Tenner, 128 P.2d 338 (1942); 20 Cal.2d 670 (1942). Parole, however, is not a matter of right, but a matter of grace. In re Harris, 80 Cal.App.2d 173 (1947), 181 P.2d 433 (1947); Gibson v. Markley, 205 F.Supp. 742, 743 (S.D. Ind. 1962); Martin v. United States Board of Parole, 199 F.Supp. 542, 543 (D.C. 1961); Lopez v. Madigan, 174 F.Supp. 919 (N.D. Cal. 1959). Parole, therefore, is a statutory privilege and not a matter of constitutional significance. Escoe v. Zerbst, 295 U.S. 490, 492 (1935); Jones v. Cunningham, 371 U.S. 236, 242 (1963).

Appellant's allegation that he is being denied parole is therefore not an allegation of the violation of rights guaranteed him under the Constitution or statutes of the United States. Therefore, he has failed to state a cause of action under Titles 28 or 42, United States Code sections 1331, 1343, 1392, 1979, and 1983. Stiltner v. Rhay, 322 F.2d 314 (9th Cir. 1963), cert.

denied, 376 U.S. 920 (1964).

Additional authority for the dismissal of the amended complaint is that appellees, as public officers, have absolute immunity for acts done by them in relation to matters committed by law to their control or supervision. Lang v. Wood, 92 F.2d 211, 212 (D.C. Cir. 1937), cert. denied, 302 U.S. 686 (1937); Spalding v. Vilas, 161 U.S. 483, 498 (1896); Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926); Taylor v. McGrath, 194 F.2d 883 (D.C. Cir. 1952); Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949); Tinkoff v. Campbell, 86 F.Supp. 331, 332 (N.D. Ill. 1949).

Finally, appellees submit that a complaint for damages under the Civil Rights Act by appellant at this time is premature. The basis for appellant's prayer for damages is alleged illegal confinement in a state prison. The proper and readily available remedy is state and federal habeas corpus Van Buskirk v. Wilkinson, 216 F.2d 735 (9th Cir. 1954); Johnson v. Walker, 317 F.2d 418 (5th Cir 1963); Davis v. State of Maryland, 248 F. Supp. 951 (D. Md. 1965). Perhaps if he does secure a final judicial determination that his confinement has been improper he may then be in a position to seek financial remuneration.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court dismissing the amended complaint should be affirmed.

Dated: August 29, 1967

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

Dated: August 29, 1967

JEROME C. UTZ
Deputy Attorney General